FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 2 1943
CHARLES ELMORE CROPLEY
CLERK

No. 490

In the Supreme Court of the United States

OCTOBER TERM, 1942

CLEARFIELD TRUST COMPANY, A CORPORATION, AND J. C. PENNEY COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	6
Argument	6
I. The right of the United States to recover on the bank's guaranty is governed by federal law	9
1. *Erie* v. *Tompkins* is not applicable	9
2. State law should not be applied as a matter of discretion	21
II. Under the *National Exchange Bank of Providence* case, the United States may recover; no reason exists for departing from that decision	25
Conclusion	35
Appendix	36

CITATIONS

Cases:	
Alameda County v. *United States*, 124 F. (2d) 611	17
American Exchange Nat. Bank v. *Yorkville Bank*, 122 Misc. 616, affirmed, 210 App. Div. 285	33
Bank of United States v. *Bank of Georgia*, 10 Wheat. 333	27
Beers v. *United States*, Devereux Court of Claims Reports (1855/56), 27	12
Board of County Commissioners v. *United States*, 308 U. S. 343	14, 21, 22
Burnet v. *Brooks*, 288 U. S. 378	22
Byron Jackson Co. v. *United States*, 35 F. Supp. 665	17
Cassarello v. *United States*, 271 Fed. 486	18
Central Vermont Railway Company v. *White*, 238 U. S. 507	18
Chesapeake & Ohio Railway Co. v. *Martin, et al.*, 283 U. S. 209	18
Childers v. *Beaver*, 270 U. S. 555	14
Cooke v. *United States*, 91 U. S. 389	27
Cox v. *United States*, 6 Pet. 172	11
Deitrick v. *Greaney*, 309 U. S. 190	7, 20
D'Oench, Duhme & Co., Inc. v. *Federal Deposit Insurance Corporation*, 315 U. S. 447	7, 20

Cases—Continued. Page

Dox v. *Postmaster General*, 1 Pet. 318 29
Duncan v. *United States*, 7 Pet. 435 ..... 7, 11
Erie R. Co. v. *Tompkins*, 304 U. S. 64 ..... 6, 9, 11, 12, 13, 17, 18
Farmers State Bank v. *United States*, 62 F. (2d) 178 12
Floyd Acceptances, The, 7 Wall. 666 12
Fulton National Bank v. *United States*, 107 F. (2d) 86 17
Graves v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466 10
Herron v. *Southern Pacific Co.*, 283 U. S. 91 18
Illinois Surety Co. v. *John Davis Co.*, 244 U. S. 376 12
Jennings v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216 ..... 14, 18
Jordan Marsh Co. v. *National Shawmut Bank*, 201 Mass. 336 29
Klazon Co. v. *Stentor Co.*, 313 U. S. 457 23
Kolker v. *United States*, 40 F. Supp. 972 17
Ladd & Tilton Bank v. *United States*, 30 F. (2d) 334 ..... 29, 31
Leather Manufacturers' Bank v. *Merchants National Bank*, 128 U. S. 26 27
Lehigh Coal & Nav. Co. v. *Blakeslee*, 189 Pa. 13 32
Lindsley v. *First National Bank*, 325 Pa. 393 16
Market Street T. & T. Co. v. *Chelton T. Co.*, 296 Pa. 230 15
National Bank of Commerce of Seattle v. *United States*, 224 Fed. 679, certiorari denied, 241 U. S. 658 12
National Metropolitan Bank v. *Realty Appraisal & Title Co.*, 47 F. (2d) 982 29
National Surety Co. v. *Manhattan Co.*, 252 N. Y. 247 29
Old Company's Lehigh v. *Mecker*, 294 U. S. 227 ..... 14, 18
Onondaga County Savings Bank v. *United States*, 64 Fed. 708 12
Price v. *Neal*, 3 Burr. 1354 27
Royal Indemnity Co. v. *United States*, 313 U. S. 289 ..... 7, 14, 19, 20, 21, 22
Security-First National Bank of Los Angeles v. *United States*, 103 F. (2d) 188 17
Smith v. *United States*, 5 Pet. 292 29
Sola Electric Company v. *Jefferson Electric Company*, No. 45, this Term 19, 21
Swift v. *Tyson*, 16 Pet. 1 ..... 7, 8, 11, 17
Time, Inc. v. *Viobin Corporation*, 128 F. (2d) 800, certiorari denied, No. 395, this Term 21
United States v. *American Exchange National Bank*, 70 Fed. 232 12
United States v. *Ames*, 24 Fed. Cas. 784, Fed. Cas. No. 14,441 12
United States v. *Ansonia Brass & C. Co.*, 218 U. S. 452 12
United States v. *Bank of American National T. and S. Assn.*, 47 F. Supp. 279 17

Cases—Continued. Page

United States v. *Bank of New York*, 219 Fed. 648 12
United States v. *Barker*, 12 Wheat. 558 11
United States v. *Brookridge Farm*, 111 F. (2d) 461 17
United States v. *Butler*, 297 U. S. 1 14
United States v. *Callahan-Walker Construction Company*, No. 65, this Term 19
United States v. *Canal Bank & Trust Co.*, 29 F. Supp. 605 18
United States v. *Chase National Bank*, 250 Fed. 105 13
United States v. *Chase National Bank*, 252 U. S. 485 ..... 13, 27
United States v. *Citizens Union Nat. Bank*, 40 F. Supp. 609 17
United States v. *Clinton National Bank*, 28 Fed. 357 12
United States v. *First National Bank*, 17 F. Supp. 611 17
United States v. *Grogan*, 39 F. Supp. 819 17
United States v. *Guaranty Trust Co.*, 293 U. S. 340 ..... 8, 24, 32
United States v. *Kings County Trust Co.*, 8 F. Supp. 72 12
United States v. *Kirkpatrick*, 9 Wheat. 720 ..... 29, 32
United States v. *National Bank of the Republic*, 2 Mackey (D. C.) 289 (1883) 12
United States v. *National City Bank*, 28 F. Supp. 144 ..... 29, 31
United States v. *National Exchange Bank*, 45 Fed. 163 12
United States v. *National Exchange Bank of Baltimore*, 270 U. S. 527 ..... 12, 13, 27
United States v. *National Exchange Bank of Baltimore, Md.*, 1 F. (2d) 888 13
United States v. *National Exchange Bank of Providence*, 151 Fed. 402, 214 U. S. 302 ..... 2, 6, 8, 9, 12, 25, 30, 31
United States v. *National Rockland Bank*, 35 F. Supp. 912 ..... 18, 29, 31
United States v. *Onondaga County Savings Bank*, 39 Fed. 259 12
United States v. *Rice and Burton*, No. 31, this Term 19
United States v. *Starr*, 20 F. (2d) 803 18
United States v. *Summerlin*, 310 U. S. 414 18
United States v. *Thompson*, 98 U. S. 486 18
United States v. *Vanzandt*, 7 Wheat. 184 29
Wells, Fargo & Co. v. *United States*, 45 Fed. 337 12
Yonkers v. *Downey*, 300 U. S. 590 14

Statutes:

Criminal Code (18 U. S. C. § 262): Sec. 148 10
Federal Emergency Relief Act of 1935, 49 Stat. 115 10
Rules of Decision Act of 1789 (1 Stat. 92, 28 U. S. C. § 725) 14

Miscellaneous:

Title 31, Code of Federal Regulations:

Section 202.0 36
Section 202.32 ..... 31, 36
Section 202.33 37
Section 202.34 ..... 32, 38

Miscellaneous—Continued. Page

Uniform Negotiable Instruments Law:
Section 23 28
Section 65 28
Section 66 28
Algier, *Cases on Negotiable Paper* 33
Brannan, *Negotiable Instruments Law*, (6th ed.) 33
Lorenzen, *Conflict of Rules Relating to Bills and Notes* 23
Note, 55 Harv. L. Rev. 1181 23
Stumberg, *Conflict of Laws* 23

In the Supreme Court of the United States

OCTOBER TERM, 1942.

No. 490

CLEARFIELD TRUST COMPANY, A CORPORATION, AND J. C. PENNEY COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 13-14) is not yet reported. The opinion of the Circuit Court of Appeals (R. 17–22) is reported in 130 F. (2d) 93.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 29, 1942 (R. 23). The petition for writ of certiorari was filed on October 24, 1942 (R. 24) and was granted December 7, 1942 (R. 24). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Pennsylvania, and not federal, decisions must be applied to determine the right of the United States to recover payment made to a guarantor of the forged endorsement of the payee of a Government check.

2. Whether, if the federal decisions are controlling, the rule announced in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, was properly applied.

REGULATIONS INVOLVED

The applicable regulations of the Treasury Department are set forth in the Appendix, infra, pp. 36–40.

STATEMENT

This action was brought by the United States against the Clearfield Trust Company, on its contract of guaranty, to recover the amount of a check, Twenty-four Dollars and Twenty Cents ($24.20), drawn by a federal disbursing officer and endorsed successively by the J. C. Penney Company and the Clearfield Trust Company after the name of the payee had been forged thereon (R. 1–3). Pursuant to stipulation and an order of the court, the J. C. Penney Company was granted leave to intervene and to be added as a party defendant (R. 7–8). The case was tried by the court without a jury on the pleadings and a stipulation of facts (R. 13). The facts are briefly as follows:

Check No. 4,797,253, for $24.20, dated at Harrisburg, Pennsylvania, on April 28, 1936, and payable

to the order of Clair A. Barner, was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia by a disbursing clerk of the Treasury Department (R. 8). The check was drawn as payment for services rendered on a Works Progress Administration project, and was placed in the mail properly addressed to Barner at his address in Mackeyville, Pennsylvania (R. 9). The check was obtained in some unknown manner by some unknown person other than the intended payee and presented to a branch store owned and operated by the J. C. Penney Company at Clearfield, Pennsylvania (R. 9). That person, representing that he was Clair A. Barner, endorsed the check in the name of Clair A. Barner and gave it to the J. C. Penney Company, whose employees, believing in good faith that he was the owner of the check and entitled to the proceeds thereof, paid over to him cash or merchandise having the value of $24.20 (R. 9). Clair A. Barner, the payee named in the check, never received the check; never authorized the endorsement thereof and never participated in the proceeds of the check (R. 9).

The J. C. Penney Company endorsed the check and deposited it with the Clearfield Trust Company, which accepted it as the agent[1] of the J. C.

[1] The endorsements on the check failed to disclose or place anyone on notice that the Clearfield Trust Company was acting as agent for collection purposes or that it presented the check in any capacity other than that of owner.

Penney Company for collection and endorsed thereon "Pay to the order of Federal Reserve Bank of Philadelphia. Prior endorsements guaranteed" (R. 9). The Federal Reserve Bank of Philadelphia in turn endorsed the check and received payment from the Treasurer of the United States (R. 4). The proceeds of the check were paid to the Clearfield Trust Company, which in turn paid the face amount thereof to the J. C. Penney Company (R. 9).

On or about May 10, 1936, the payee named in the check, Clair A. Barner, advised the timekeeper and the foreman of the W. P. A. project on which he was employed that he had not received the check (R. 10). This information was duly communicated to "other agents" of the United States and on November 30, 1936, Barner executed an affidavit alleging that the endorsement of his name on the check was a forgery (R. 10). On January 12, 1937, the Federal Reserve Bank of Philadelphia notified the Clearfield Trust Company of the alleged forgery (R. 10). On August 31, 1937, the Clearfield Trust Company was notified that the United States was demanding reimbursement on the check (R. 10).

The J. C. Penney Company's store at Clearfield cashes many hundreds of checks each year for purchasers or probable purchasers of merchandise (R. 10). If a check is returned unpaid or returned for reclamation within a short time after the date

on which it was cashed, employees of the company often can locate the person who cashed the check (R. 10). In the instant case, however, despite diligent inquiries, none of the employees of the Penney Company was able to ascertain the identity of or locate the person who forged the signature of the payee (R. 10).

The Clearfield Trust Company requested the J. C. Penney Company to reimburse it for the amount of the check, but the Penney Company refused on the ground that it was not legally obligated to make repayment because of the Government's laches in notifying the endorsers of the forgery (R. 11).[2]

The District Court dismissed the Government's complaint on the ground that the rights of the parties were to be determined by Pennsylvania law and that under Pennsylvania law the failure of the United States to proceed with care and diligence in giving proper notice of the forgery of the payee's name to the endorser operated as a bar to the Government's rights to recover (R. 14).

[2] The stipulation also contains extracts from correspondence between Gwinn & Pell, attorneys for J. C. Penney Company, and an officer of the United States (the name or position of the officer is not set forth in the stipulation) in which Gwinn & Pell asked to be advised what persons were suspected of "forging the check in question" and the reply stated that the investigation did not disclose the identity of the negotiator and that if the investigation had developed a suspect, it would not be advisable to furnish the name of the suspect until "a trial had proved the suspicions were well founded" (R. 11).

508888—43——2

On appeal, the Circuit Court of Appeals unanimously reversed the judgment. The court concluded that Pennsylvania law was not controlling because the rights and obligations of the United States in respect of the check constituted a federal question to be decided from "materials in hand" (R. 21). It found the appropriate federal rule in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, which held that the right of the United States to recover on a forged endorsement arose as soon as payment had been made and that the giving of notice was not a condition precedent to the institution of suit for recovery. It rejected petitioners' contentions that any showing of loss had been made, sufficient to bring the instant case within the doctrine of certain lower federal court cases holding that an endorsee is protected if he shows loss resulting to him from an unreasonable delay in giving notice of the forgery (R. 21).

SUMMARY OF ARGUMENT

I

The right of the United States to recover on the bank's guaranty is governed by federal law. The doctrine of *Erie R. Co.* v. *Tompkins* is not applicable. The consequences of the forgery and the obligation to the United States which the bank undertook as guarantor are federal questions, grounded in federal statutory and administrative provisions, and in considerations of federal public policy. Neither historically nor analytically does

the *Tompkins* doctrine apply. It had been settled prior to *Swift* v. *Tyson* that the contractual liability of obligors to the United States was not governed by local law but by the "principles of the common law." *Duncan* v. *United States*, 7 Pet. 435, 446, 449. Neither the constitutional nor statutory basis underlying the *Tompkins* case is relevant to the decision of a federal question such as that here presented. Moreover, the evils which prompted that decision are not threatened here, since the United States sues and is sued normally in the federal courts. Indeed, an attempt by the federal courts to apply state decisions in the present situation would result in a kind of state law quite as illegitimate as the federal common law applied under *Swift* v. *Tyson*; for the application of state rules of decision to the United States cannot be discovered in the decisions of state courts.

Recent decisions of this Court fortify our position. The meaning and enforceability of the contractual guaranty present a federal question as clearly as did the question of noncontractual interest in *Royal Indemnity Company* v. *United States*, 313 U. S. 289. The protection of federal funds through civil guaranties, in the event of loss through criminal acts, is a matter of federal policy. *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447. If any rule of estoppel is to be applied it should be a federal, not a local, rule. *Deitrick* v. *Greaney*, 309 U. S. 190.

State law should not be applied as a matter of discretion. There is no dearth of federal precedents in this field. The need for uniformity is obvious. Congress cannot be supposed to have intended that, with the overruling of *Swift* v. *Tyson*, the established principles governing the rights of the United States on commercial paper should be abandoned. Furthermore, if local law were to be applied, highly complex questions of conflict of laws would have to be resolved, either under the conflict of laws rules of the forum, if any could be discovered, or under a new body of federal conflict of laws rules.

United States v. *Guaranty Trust Co.*, 293 U. S. 340, is not opposed to our position. That case involved a conflict of laws in the international sphere, and held that whether title passed under an endorsement in a foreign country is determined by the laws of that country. It does not prevent the maintenance of a uniform rule of law applicable to the United States with respect to transactions of the United States within this country.

II

United States v. *National Exchange Bank of Providence*, 214 U. S. 302, is dispositive of this case. That decision holds that prompt notice of discovery of an endorser's forgery is not a condition of recovery by the United States as drawee after payment has been made. Nor is a defense

based on change of position applicable here. The petitioner bank has shown no loss due to the delay; and, if relevant, the prior endorser has likewise shown no such loss. To presume loss would in effect be to overrule the *Exchange Bank of Providence* case. Furthermore, here the action is not in quasi contract but is on an express guaranty which fixes the incidence of the loss due to the forgery.

ARGUMENT

I

THE RIGHT OF THE UNITED STATES TO RECOVER ON THE BANK'S GUARANTY IS GOVERNED BY FEDERAL LAW

1. *Erie R. Co.* v. *Tompkins is not applicable.*—We submit that the court below was right in holding that the case is ruled by *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302. There it was held that the right of the United States to recover from a presenting bank where the endorsement of the payee was forged arose upon payment to the presenting bank and was in no sense conditioned on demand or the giving of prompt notice of the discovery of the forgery. The decision was one of federal, not local, law. The decision has never been modified or questioned by this Court. No departure is now required, we submit, by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

In considering whether state decisions must now be deemed controlling on the question in issue, nothing is gained by reference to the generalization

that when the United States enters into business transactions it is governed by ordinary principles of commercial law (*Cf.* Pet. Br. 17, 19n). The United States acts in a governmental capacity when it performs constitutional functions. *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477. The generalization means simply that the Government agrees to be bound, in respect of transactions such as the issuance of checks, by the principles of the law merchant. This is far from meaning that a federal court may not decide what those principles are on the basis of the materials at hand, and must look to the decisions of a particular state.*

The rights and obligations of the United States on the instrument here involved present a federal question. The payment for which this check was given grew out of services performed under the Federal Emergency Relief Act of 1935, 49 Stat. 115. The check was issued pursuant to the constitutional power to pay the debts of the United States. The forgery was an offense against the United States under section 148 of the Criminal Code (18 U. S. C. § 262). The petitioner bank's guaranty of prior endorsements was required by regulation of the Treasury Department (see Appendix, pp. 36–37). Thus the consequences of the forgery and the obligation undertaken by the final endorser are clearly

* Nor does it mean that the law merchant fails invariably to take account of the governmental character of a party or funds, as for example with respect to laches or the recovery of money paid under mistake of law.

federal questions, grounded in federal statutory and delegated rules, and in considerations of federal public policy.

To apply Pennsylvania law would be to misconceive the *Tompkins* case. The applicability of federal law does not depend on *Swift* v. *Tyson*, 16 Pet. 1, and does not fall with the overruling of that case. It had been settled prior to *Swift* v. *Tyson* that the liability of parties on a bond to the United States was not governed by the law of the state where the bond was executed but by the "rules of the common law." *Cox* v. *United States*, 6 Pet. 172, 204; *Duncan* v. *United States*, 7 Pet. 435, 449. The question was particularly acute in those cases, since if local law had been applied it would have been the civil law of Louisiana. "In contemplation of law," the Court said, the contract is made where the principal powers of government are exercised (7 Pet. 449); this was the locution employed to reject Louisiana law in favor of the "principles of the common law" (*Id.* 446).

Under the regime of *Swift* v. *Tyson*, since the law of commercial contracts and negotiable instruments was of course regarded as "general law," the courts found it unnecessary to consider separately the applicability of state decisional law to contracts or negotiable instruments involving the United States. The law merchant as interpreted by the federal courts was as a rule applied without discussion. *United States* v. *Barker*, 12

Wheat. 558; *The Floyd Acceptances*, 7 Wall. 666; *Cooke* v. *United States*, 91 U. S. 389; *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302; *United States* v. *Ansonia Brass & C. Co.*, 218 U. S. 452; *United States* v. *National Exchange Bank of Baltimore*, 270 U. S. 527.[4] Prior to *Erie R. Co.* v. *Tompkins*, an issue in regard to governing law insofar as the United States was concerned could have arisen only where the state law took the form of a state statute or state decisions interpreting such statutes. Such an issue seems to have been rarely presented and cannot be said to have been clearly considered or determined. In *National Bank of Commerce of Seattle* v. *United States*, 224 Fed. 679, 681 (C. C. A. 9); certiorari denied, 241 U. S. 658, local statutory law was held not to apply to government checks. However,

[4] *United States* v. *National Bank of the Republic*, 2 Mackey (D. C.) 289 (1883); *United States* v. *Bank of New York*, 219 Fed. 648 (C. C. A. 2); *United States* v. *American Exchange National Bank*, 70 Fed. 232 (S. D. N. Y.); *Onondaga County Savings Bank* v. *United States*, 64 Fed. 703 (C. C. A. 2); *Wells, Fargo & Co.* v. *United States*, 45 Fed. 337 (C. C. N. D. Calif.); *United States* v. *National Exchange Bank*, 45 Fed. 163 (C. C. E. D. Wisc.); *United States* v. *Onondaga County Savings Bank*, 39 Fed. 259 (N. D. N. Y.); *United States* v. *Clinton National Bank*, 28 Fed. 357 (C. C. S. D. Iowa); *Farmers State Bank* v. *United States*, 62 F. (2d) 178 (C. C. A. 5). But *cf United States* v. *Kings County Trust Co.*, 8 F. Supp. 72 (E. D. N. Y.); see *United States* v. *Ames*, 24 Fed. Cas. 784, 786, Fed. Cas. No. 14,441 (C. C. D. Mass.); *Beers* v. *United States*, Devereux Court of Claims Reports (1855/56), 27, 28; *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 381.

the more usual practice[*] apparently was to apply federal substantive law without considering state statutes.

Apart from history, both the rationale of the *Tompkins* case and the decisions of this Court subsequent to it demonstrate its inapplicability. To the extent that it may be thought to rest on a constitutional basis, that basis is nonexistent here, for assuredly Congress could by explicit legislation define the rights and obligations of the United States and guarantors on instruments issued by the United States; and inconsistent state laws would

[*] In *United States* v. *National Exchange Bank of Baltimore, Md.*, 1 F. (2d) 888 (C. C. A. 4) the United States sued to recover the difference between the amount to which a check paid by it had been fraudulently raised and the amount for which it was drawn. The check had been drawn in the District of Columbia and endorsed in South Carolina. The plaintiff argued that, under the provisions of the Uniform Negotiable Instruments Act, the defendant was a holder in due course. In regard to that point, Judge Rose said (at page 889): "We do not find it necessary to pass upon these interesting questions, as well of substantive law as of pleading, because in our view the plaintiff, having been both the drawer and the drawee of the check, may not * * * recover * * *." Judge Rose then reached a conclusion in defendant's favor on the basis of general commercial law. In affirming the judgment of the circuit court of appeals in the Supreme Court, 270 U. S. 527, Mr. Justice Holmes similarly relied on general law and gave no consideration to state statutes. A similar observation by the lower court in *United States* v. *Chase National Bank*, 250 Fed. 105 (C. C. A. 2) was not discussed by this Court in its opinion (*United States* v. *Chase National Bank*, 252 U. S. 485), the decision being rested upon the general law merchant.

have to yield. See *United States* v. *Butler*, 297 U. S. 1, 74; *cf. Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216; *Old Company's Lehigh* v. *Meeker*, 294 U. S. 227 (holding state bank collection code inapplicable to determine priority in insolvency of a national bank). To the extent that the *Tompkins* decision rests on the terms of the Rules of Decision Act of 1789 (1 Stat. 92, 28 U. S. C. § 725), it is likewise inapplicable, since the Act declares an exception for cases "where the constitution, treaties or statutes of the United States otherwise require or provide". This being a federal question, state laws could apply only by virtue of an express [*] or tacit [†] direction by Congress that on particular issues it should be accepted as the federal law; it would not apply *ex proprio vigore* or because of the mandate of the Act of 1789.

Moreover, the evils which prompted the *Tompkins* decision are not threatened here and, indeed, comparable evils would arise from an extension of the decision to this case. The unseemly practice whereby the outcome of a case turned on the fortuitous circumstance of diversity of citizenship has now been rectified. But no such offensive

[*] *Cf. Childers* v. *Beaver*, 270 U. S. 555; *Yonkers* v. *Downey*, 309 U. S. 590.

[†] *Cf. Board of County Commissioners* v. *United States*, 308 U. S. 343; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289.

practice is here involved. Suits by or against the United States are by their nature heard in the federal courts. There is no occasion to turn to state law for the sake of uniformity of rules of decision. Also, the *Tompkins* case rectified the anomaly that federal courts could declare federal law which Congress had no power to prescribe or alter. In the present case an anomaly would arise if state law were applied; for federal courts would be declaring state law as applied to facts which, since they involve the United States as a party, would never be presented for decision to state courts. The endeavor to define state law, frequently difficult, would here be quite unenlightened and subject to no future illumination. Thus, in the present case, the Pennsylvania courts have no opportunity to decide whether the decision in *Market Street T. & T. Co.* v. *Chelton T. Co.*, 296 Pa. 230, which petitioners contend is controlling, is applicable to the United States as drawee. That decision was concurred in by a bare majority of the court; its facts were peculiar;* and its authority as applied to the United States would require consideration of the questions whether it rested on a doctrine of laches inapplicable to the United States, whether the delay was reasonable in the case of the United States, and whether the United States is subject to the same duty of notification in view of its active interest in making its own investigation

* There the plaintiff bank had drawn a check upon itself payable to the order of S. W. Samson, whereas it intended

to apprehend the offender under the federal criminal law. These questions are suggested here not to argue that Pennsylvania law would grant re-

to make the check payable to Albert W. Sanson. Before the check left the bank, or shortly thereafter, the name of S. W. Samson was changed to A. W. Sampson, the change being obvious on the face of the check. A letter containing the check was mailed to one Albert W. Sampson at an address differing from that of Albert Sanson, the intended payee. There was an Alfred W. Sampson at the address given which had been obtained out of the directory and he endorsed the check and deposited it with the defendant bank which guaranteed the endorsement and forwarded it for collection. The check was paid by the plaintiff bank, and subsequently one of its officers advised the defendant bank that the check was all right. The forger thereafter withdrew from defendant money equaling the face value of the check. Fifty days later, the intended payee, Sanson, inquired as to the check which was due him. The entire chain of mistakes was then discovered and five days later the plaintiff made demand for the return of the money, which was refused. By four to three decision the court held that the plaintiff bank could not recover. The majority rested their opinion primarily upon the imposter rule that the plaintiff had intended the very person who endorsed the check to be the payee, and it fortified its decision by holding that the plaintiff bank was negligent in giving notice of the forgery. It is not too clear from the opinion whether it rested upon the fifty-day period during which the forgery was not discovered or the five-day period after the discovery of the forgery. In this aspect of the case the majority rested its conclusion upon the fact that damages would be presumed as a result of the delay.

In *Lindsley* v. *First National Bank*, 325 Pa. 393 (1937), the court held that a payee could recover from a cashing bank without giving notice of the discovery of the forgery of the payee's signature. It held that the necessity of giving prompt notice of the discovery of the forgery results from a relationship such as that of drawer-drawee or depositor-bank, and that where there is lack of privity the main consideration of the rule falls (pp. 399–400).

covery to the United States, but to illustrate that any inference on that issue by the federal courts must be uninformed; and hence what would be applied is a form of state law as illegitimate in its way as the federal common law of *Swift* v. *Tyson*.

The decisions of this Court since the *Tompkins* case fortify the conclusion that federal rules apply. While this Court, in its recent decisions, has not determined the question of the law applicable in cases involving Government checks,* it has ap-

*Since the decision of this Court in *Erie R. Co.* v. *Tompkins*, divergent opinions have been expressed in the lower federal courts upon the question whether federal law or state law governs the rights and obligations of the United States when it becomes a party to a negotiable instrument or a contract.

Some courts have adopted the view that state law governs. *Alameda County* v. *United States*, 124 F. (2d) 611 (C. C. A. 9) (state law governs in regard to powers of a municipal corporation); *United States* v. *Brookridge Farm*, 111 F. (2d) 461 (C. C. A. 10) (contract); *Security-First National Bank of Los Angeles* v. *United States*, 103 F. (2d) 188 (C. C. A. 9) (negotiable instrument); *United States* v. *Bank of American National T. and S. Ass'n*, 47 F. Supp. 279 (N. D. Calif.) (negotiable instrument); *United States* v. *Citizens Union Nat. Bank*, 40 F. Supp. 609 (W. D. Ky.) (negotiable instrument).

In other cases federal law had been held to be controlling. *Kolker* v. *United States*, 40 F. Supp. 972 (D. Md.) (contract); *United States* v. *Grogan*, 39 F. Supp. 819, 820 (D. Mont.) (contract); *Byron Jackson Co.* v. *United States*, 35 F. Supp. 665 (S. D. Calif.) (contract); *cf. United States* v. *First National Bank*, 17 F. Supp. 611 (W. D. Okla.), negotiable instrument). Other courts have applied federal law without discussing the point of governing law. *Fulton National Bank* v. *United States*, 107 F. (2d) 86 (C. C. A. 5)

plied federal substantive law in a wide range of cases involving situations which it characterized as federal questions because arising under the Constitution of the United States or an Act of Congress.[10] Insofar as government contracts in

(negotiable instrument); *United States* v. *Canal Bank & Trust Co.*, 29 F. Supp. 605 (E. D. La.) (negotiable instrument); *United States* v. *National Rockland Bank*, 35 F. Supp. 912 (D. Mass.) (negotiable instrument).

[10] Similarly, prior to *Erie R. Co.* v. *Tompkins*, state law was held not applicable in a wide range of cases. In *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 94, a state constitutional requirement that defense of contributory negligence be submitted to a jury was held to be inapplicable to a federal court. In *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216, 226 and *Old Company's Lehigh* v. *Mecker*, 294 U. S. 227, 230, a provision of a state Bank Collection Code in regard to preferred claimants in case of insolvency of bank was held to be not applicable to a national bank; in *United States* v. *Starr*, 20 F. (2d) 803 (C. C. A. 4) it was held that federal law governs action by the United States on relation of materialmen to recover against a contractor on the contractor's bond; in *Chesapeake & Ohio Railway Company* v. *Martin, et al.*, 283 U. S. 209, federal law was applied to a bill of lading involving interstate shipment. In *Central Vermont Railway Company* v. *White*, 238 U. S. 507, it was held that, in an action brought under the Employers' Liability Act, state rules in regard to burden of proof for the defense of contributory negligence were not applicable. It is well established that state statutes of limitation are not applicable to the United States. *United States* v. *Thompson*, 98 U. S. 486; *United States* v. *Summerlin*, 310 U. S. 414. In *Cassarello* v. *United States*, 271 Fed. 486 (M. D. Pa.) a state statute regulating insurance was held to be not applicable to federal war risk insurance policy, the court saying (p. 488): "* * * a contract made in pursuance of a federal statute must be construed with reference to such statute, and cannot be cotnrolled by state laws or decisions."

general are concerned, this Court has consistently treated them as governed by federal substantive law. *Royal Indemnity Co.* v. *United States,* 313 U. S. 289; *cf. United States* v. *Rice and Burton,* No. 31, this Term, decided November 9, 1942; *United States* v. *Callahan-Walker Construction Company,* No. 65, this Term, decided November 9, 1942. The Court of Claims, in which the overwhelming majority of cases involving government contracts cases are heard, likewise uniformly applies federal substantive law.

The foregoing principles were most recently stated in *Sola Electric Co.* v. *Jefferson Electric Co.,* No. 45, this Term. Discussing the *Tompkins* case, the Court said:

> But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296; *Prudence Corp.* v. *Geist,* 316 U. S. 89, 95; *Board of Comm'rs* v. *United States,* 308 U. S. 343, 349–50; cf. *O'Brien* v. *Western Union Telegraph Co.,* 113 F. 2d 539, 541. When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions.

> the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209; *Dietrick* v. *Greaney*, 309 U. S. 190, 200–01.

Surely the meaning and enforceability of the contractual guaranty in the present case present a federal question as clearly as did the rate of non-contractual interest to be allowed against a surety in *Royal Indemnity Co.* v. *United States*, 313 U. S. 289. In another aspect, the protection of federal funds through civil guaranties, in the event of loss through criminal acts, is a matter of federal policy which need not be remitted to state law for resolution. *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447. And if any rule of estoppel is to be invoked it should be a federal, not a local, rule. *Deitrick* v. *Greaney*, 309 U. S. 190.

It therefore seems unnecessary to consider the broad question whether the *Tompkins* decision has any application in cases where jurisdiction does not rest on diversity of citizenship. It is indeed noteworthy that this Court has not extended the doctrine beyond diversity cases. See the concurring opinion of Mr. Justice Jackson in *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447, 467.[11] It is also noteworthy.

[11] The statement in this opinion (p. 474) that "No doubt many questions as to the liability of parties to commercial

that the doctrine may be deemed inapplicable even in diversity cases, where the question for decision involves a federal policy. *Sola Electric Company* v. *Jefferson Electric Company, supra.* To exclude the doctrine entirely in nondiversity cases might, to be sure, raise difficult problems where federal and nonfederal grounds are joined, as in certain cases involving trade-marks and unfair competition. *Time, Inc.* v. *Viobin Corporation,* 128 F. (2d) 860 (C. C. A. 7), certiorari denied, No. 395, this Term. The present case does not require any such broad formula to support the application of federal law.

2. *State law should not be applied as a matter of discretion.*—Petitioners contend that in any event state law should be applied by the federal courts as a matter of discretion (Br. p. 23). Reliance is placed on *Board of County Commissioners* v. *United States,* 308 U. S. 343 and *Royal Indemnity Company* v. *United States,* 313 U. S. 289. But the same considerations which make the *Tompkins* doctrine inappropriate serve also to answer this contention. The federal policy involved points to the desirability of a uniform rule. If payment on the Works Progress Administration checks had been made to the presenting bank by the Treasury in ~~federal law.~~

---

paper which comes into the hands of the Corporation will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted" refers, of course, to questions of liability as between private parties on their own instruments and has no reference to commercial paper issued by the United States. Cf. Pet. Br., p. 22n.

Washington rather than through the fiscal agency of the Federal Reserve Banks a uniform result would more plainly be required. The interposition of the Federal Reserve Banks should have no significance in fixing the rights and duties of the United States. The purpose of having the checks payable on their face through the Federal Reserve Banks was, we are advised, to provide employment throughout the United States on clerical work which otherwise would be performed in Washington. This circumstance has no relation to the substantive rights of the parties.

Moreover, there is no dearth of federal law such as characterized the *Royal Indemnity* and *Board of County Commissioners* cases, *supra*. A federal law of negotiable instruments has been developed over a period of more than a century, and indeed it is our position, as the court below held, that an existing decision of this Court is controlling in the present case. It is true that to the extent that this federal law has been built up under the doctrine of *Swift* v. *Tyson* it is no longer authoritative in private controversies. But surely there has been no congressional mandate that in its legitimate sphere the federal judiciary shall abruptly cease to apply the law merchant as it has been developed. As was observed by Mr. Chief Justice Hughes in *Burnet* v. *Brooks*, 288 U. S. 378, 389, the overruling of constitutional doctrines with regard to state jurisdiction to tax did not affect the meaning of a federal

statute enacted in the prior era, for, as the opinion pointed out, Congress did not enact a formula. So here, the abandonment of a conception of federal common law which came to be regarded as spurious does not carry with it an abandonment of federal rules as applied to federal questions.[12]

An additional factor operating against reference to state law should be pointed out. In mo cases Government checks will, between their issuance and final payment, pass through hands in several states. If state law is to be applied the rights and obligations of the United States will be subject to exceptional uncertainty. If state law were applied in all its fullness, that law would include the conflict of laws rules of the forum. *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 457. The rules of conflict of laws relating to negotiable instruments are the subject of great divergence in both theory and practice. See Lorenzen, *Conflict of Rules Relating to Bills and Notes;* Stumberg, *Conflict of Laws,* pp. 223–230; Note, 55 Harv. L. Rev. 1181.

[12] Whether rights as between private parties (e. g., successive endorsers) on a Government check are determined by federal or state law need not here be decided. Compare the question of the rights *inter se* of cosureties on a bond to the United States. It may well be that even if state law is applied it will take account of the federal rule to the extent that the rights and liabilities of the United States are relevant. In any event there will be no greater complexity than in the ordinary case of conflict of laws problems relating to negotiable instruments, where the check is endorsed in one or more states and presented for payment in another.

Even if, as a compromise, federal conflict of laws rules were developed, uncertainty would follow; the applicable law might be fixed as that of the state where the endorser signed and mailed the instrument, or where the fiscal agent of the United States credited the account of the presenting bank, or where the Treasury and the General Accounting Office settled the Government accounts. There is no need or justification for importing these complexities into this class of cases.

United States v. *Guaranty Trust Co.*, 293 U. S. 340, is not opposed to our position. As the court below pointed out, that case was concerned with a conflict of laws in the international sphere. This Court held that the liability of the presenting bank to the United States on account of the forged endorsement depended on the question whether title had passed notwithstanding the forgery; and whether title had passed must be determined, the Court held, by the law of the country where the transfer occurred, in that case Yugoslavia. Because the payee's address was Yugoslavia, the check had "something of the quality of a foreign bill" (p. 346). The question of domestic law was whether the guaranty by the bank was a guaranty of genuineness of signatures of prior endorsers or a guaranty that title had passed. This question the Court seems to have decided as a question of general law. Indeed, if the decision in that case had anticipated the *Tompkins* doctrine the issue would have been referred to the conflict of laws of New York, since the case arose in a

federal court in that state. In short, the decision does not prevent the maintenance of a uniform rule of law applicable to the United States with respect to transactions within the United States to which the United States is a party.

II

UNDER THE *NATIONAL EXCHANGE BANK OF PROVIDENCE* CASE, THE UNITED STATES MAY RECOVER; NO REASON EXISTS FOR DEPARTING FROM THAT DECISION

In *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, this Court held that, when the signature of the payee on a Government check was forged, an endorser was not relieved of liability because of a protracted delay on the part of the United States in giving notice of the forgery; the right to maintain the suit is not conditioned on the giving of prompt notice of the discovery of the forgery. There certain pension checks bearing the forged endorsements of the payees named therein had been presented to and cashed by the Exchange Bank of Providence. The checks were forwarded to the National Bank of the Republic of Boston for collection, which presented the checks to the Assistant Treasurer of the United States at Boston, Massachusetts, and collected the amount thereof (214 U. S. 309–310).[13] Years elapsed before the

[13] Although the United States originally brought suit against the presenting bank it later amended its action and substituted as defendant the Exchange Bank of Providence, apparently upon the theory that the presenting bank was not liable because it was acting only as an agent of the Exchange Bank and did not represent itself to be the owner of the

forgeries were discovered, and notice thereof was not given to the Exchange National Bank until several months after the discovery of the forgeries. No actual damage resulting from the delay in giving notice of the forgery was shown. The action was one for money had and received, and was quasi-contractual in nature.

The circuit court of appeals, holding against the United States by a divided court, had said (151 Fed. 402, 406):

> Some of the cases in discussing the matter differ as to the equities under circumstances like those before us. Some hold that the loss should be allowed to remain where it fell. However this may be, any demand for prompt notice in cases of forgeries is wholesome. When discovered, forgeries should not be coddled, but should be made known, both to the public prosecutor and to those immediately concerned; and any attempted test with reference to the question whether

---

checks. In the instant case the Clearfield Trust Company is stated in the stipulation of facts to have presented the check for collection on behalf of its principal, the J. C. Penney Company (R. 9). There is nothing on the face of the check or in the form of the endorsements to indicate that any such relationship existed, and, under the applicable regulations of the Treasury Department, the Clearfield Trust Company would have been unable to obtain payment through the Federal Reserve Bank unless it had guaranteed the genuineness of all prior endorsements. Accordingly, it is not in a position to take advantage of the fact that in reality it was acting as a collecting agent for the J. C. Penney Company, nor do petitioners make any point thereof.

> the party from whom recovery is sought has suffered by delay is wholly unsatisfactory, because the determination whether one who has suffered by a forgery may recoup himself is more a matter of chances, which cannot be estimated, than the result of logical investigation of particular facts.

Petitioners' case could not be put more forcefully. Yet this Court unanimously reversed, with a comprehensive opinion. The Court followed its prior decision in *Leather Manufacturers' Bank* v. *Merchants National Bank*, 128 U. S. 26, where it was held that the cause of action arose when the money was paid out on a check bearing a forged endorsement and was in no wise conditioned on notice or demand. The Court distinguished cases resting on the doctrine of *Price* v. *Neal*, 3 Burr. 1354. That doctrine,[14] denying recovery to a drawee who has paid under a forged signature of the drawer, makes the drawee chargeable with knowledge of the drawer's signature, and in the absence of a prompt disavowal his acceptance or payment of the draft constitutes adoption of the signature. In other words, prompt notice of forgery is a condition precedent to the maintenance of a suit. No such doctrine obtains with respect to the forgery of a signature of the payee. The drawee is not charge-

[14] See *Cooke* v. *United States*, 91 U. S. 389; *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333; *United States* v. *Chase National Bank*, 252 U. S. 485; *United States* v. *National Exchange Bank of Baltimore*, 270 U. S. 527.

able with knowledge of such signature and in most instances does not in fact know the payee's signature. The person presenting the check who impliedly warrants by his endorsement or presentment for payment that the instrument is valid and that he has title thereto (Negotiable Instruments Law, secs. 65, 66) is the one presumed to know and to vouch for the genuineness of the payee's signature. Accordingly, it is not a condition precedent to suit that prompt notice of the discovery of the forgery be given. Lack of such notice and the damage resulting therefrom are purely matters of defense.

So far as relevant, delay in giving notice of forgery would be a matter of defense by way of estoppel. Nothing in the Negotiable Instruments Law requires such notice, in contrast to the strict provisions for notice to endorsers, in event of dishonor.[15] The defense of estoppel should include the elements of justifiable reliance on the plaintiff's conduct to the detriment of the defendant. *Na-*

[15] Section 23 of the Uniform Negotiable Instrument Law provides: "Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

This provision apparently recognizes a defense of estoppel in circumstances not defined, though it does not deal in terms with the situation where money paid out is sought to be recovered.

tional Metropolitan Bank v. *Realty Appraisal & Title Co.*, 47 F. (2d) 982 (App. D. C.); *Jordan Marsh Co.* v. *National Shawmut Bank*, 201 Mass. 397. It may be doubted whether the defense is available on the score of laches of government employees. This Court has held that such laches could not discharge the obligation of sureties to the United States even though they were compelled to bear the loss personally as a result of delay by the officers of the United States in bringing action. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 736–737; *United States* v. *Vanzandt*, 11 Wheat. 184; *Dox* v. *Postmaster General*, 1 Pet. 318, 325; *Smith* v. *United States*, 5 Pet. 292, 298.

In any event, as the court below held, petitioners have shown no damages due to the delay. Hence the cases relied upon by petitioners on this branch of the argument are distinguishable. *Ladd & Tilton Bank* v. *United States*, 30 F. (2d) 334 (C. C. A. 9); *United States* v. *National Rockland Bank*, 35 F. Supp. 912 (D. Mass.); *United States* v. *National City Bank*, 28 F. Supp. 144 (S. D. N. Y.). In those cases prior endorsers became insolvent during the period of delay, and thus the defendant bank's recourse was lost. In the present case the bank, so far as appears, can still recover from the J. C. Penney Company.[16] And if it be pertinent to in-

[16] Cf. *National Surety Co.* v. *Manhattan Co.*, 252 N. Y. 247, holding that a depositor, despite negligence in notifying its drawee of forged indorsements, may recover from the drawee, since the latter is not prejudiced in view of its right against the prior endorser.

quire into the latter's situation, no prejudice has been shown. The stipulation (R. 10) is general, and a court could take judicial notice of the facts there asserted. Considerably more is necessary to show prejudicial reliance. It would have to be assumed, to support petitioners' position, that a Secret Service investigation by the Treasury is measurably less effective than investigation by the company would have been; that earlier notice would have enabled the company to identify and apprehend the forger; and that the forger would have proved to be solvent. There is no warrant, we submit, for these assumptions. To indulge them would be to dispense with the necessity of showing actual prejudice as a defense, and in substance to overrule the *Exchange Bank of Providence* case.

So far we have been considering the instant case as one corresponding exactly to the *Exchange Bank of Providence* case. There exists, however, one difference which would seem to be dispositive of petitioner's contention, even were it otherwise valid, that a duty existed on the part of the United States to give prompt notice of the discovery of the forgery. As before observed, the *Exchange Bank* case was one involving an action for money had and received. The instant case, however, was brought against the Clearfield Trust Company for breach of its express guarantee of prior endorse-

ments, and the J. C. Penney Company was permitted to intervene as a party defendant.[17]

The guarantee was made by the Clearfield Trust Company to the Federal Reserve Bank of Philadelphia. Petitioners concede that they are aware of the Treasury Regulations which govern the extent and scope of the authority of a Federal Reserve bank when acting as a fiscal agent of the United States (Pet. Br., p. 23). Under the appropriate Treasury Regulations the Federal Reserve bank was authorized to cash government checks only "when they are presented and properly endorsed by responsible incorporated banks and trust companies who guarantee all prior endorsements thereon" (Regulation 32, *infra*, pp. 36–37). The United States is bringing this suit in its capacity as drawee and neither it nor its agent is chargeable with the knowledge of the signature of the payee. Accordingly when the check was presented for payment, its fiscal agent, having no knowledge if the endorsement on the check was that of the payee, in accordance with regula-

[17] In the *Ladd & Tilton Bank* case, 30 F. (2d) 334, which involved forgery of the signature of the payee of a registered Liberty Bond, the Ladd & Tilton Bank presented that bond in exchange for a coupon bond which it subsequently sold. It did not itself endorse the bond or guarantee the genuineness of the owner's endorsement. In that case, as in the *National Exchange Bank of Providence* case, the action accordingly was held to be one for money had and received. In *United States* v. *National City Bank*, 28 F. Supp. 144 (S. D. N. Y.), and *United States* v. *National Rockland Bank*, 35 F. Supp. 912 (D. Mass.), the courts apparently also treated the actions as suits for money had and received.

tion and with the commercial practice of banks, required that the presenting bank guarantee the correctness and genuineness of the endorsement. When the money was disbursed on the strength of that guarantee, the guarantee was at that time broken because the signature in fact was not that of the payee. See *Lehigh Coal & Nav. Co.* v. *Blakeslee,* 189 Pa. 13. The United States had completed its part of the contract when it disbursed the money and had not specifically undertaken any duty to the presenting bank either by way of demand or notice. Nor may any such duty be implied. The Clearfield Bank was chargeable with knowledge of the manner in which the Treasurer handled checks bearing a forged endorsement (Regulation 34 (b), *infra,* pp. 38–39) and no provision is made therein for the giving of prompt notice of the forgery other than that the Reserve Bank, upon notice from the Treasury and receipt from it of a photographic copy of the check, is expected to give notice to or make demand at once upon the prior endorsers. This provision is clearly for the protection of the Treasury and negatives the idea that the United States itself impliedly bound itself to give prompt notice. Cf. *United States* v. *Kirkpatrick,* 9 Wheat. 720, 736–737. The damage which the United States seeks to recover arises from a breach of contract and the United States accordingly is entitled to recover the damages which it has suffered, namely, the disburse-

ment of its funds to the improper person."[18] Brannan, *Negotiable Instruments Law* (6th ed.), pp. 814–815; See Aigler, *Cases on Negotiable Paper*, p. 555n.[19]

It must be presumed, likewise, that the Clearfield Trust Company in presenting the check to the Federal Reserve Bank did so with the full understanding of the rights and obligations which it was assuming under the appropriate Treasury Regulations. It did not attempt to present the check for collection without endorsement as under the law merchant it generally had a right to do. Brannan, *op. cit.* p. 330. On the contrary, it assumed direct contractual obligation to the drawee. Nor is the J. C. Penney Company in any different position. It delivered the check to the Clearfield

[18] It is unnecessary to consider in this connection the observation of this Court in *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, that the guarantee of prior endorsements meant no more than a guarantee that the presenting bank had good title to the check. It is clear in the instant case, even under Pennsylvania law, that the Clearfield Trust Company had no title.

[19] "On such questions [effect of negligence and change of position] it may be very important whether the plaintiff's action is purely quasi-contractual or is grounded on a warranty found perhaps in the terms of the defendant's indorsement." Aigler, *loc. cit. supra.* See also *American Exchange Nat. Bank* v. *Yorkville Bank*, 122 Misc. 616, affirmed, 210 App. Div. 885.

Trust Company to act as its agent in collecting the money from the United States. While that agency contract was not made known to the United States, and in effect J. C. Penney was an undisclosed principal, nevertheless, now that the facts are known, it must likewise be held to have guaranteed to the United States through its agent the genuineness of the payee's endorsement. Both principal and agent have broken their contract of guarantee, and the United States has been damaged thereby to the face amount of the check, together with the interest thereon. The present action therefore is clearly one in contract,[20] and not in quasi-contract, and the contract fixed the incidence of loss.

---

[20] While doubtless the United States in the instant case also could maintain an action for money had and received, the complaint makes it clear that the action is one for breach of contract (R. 1). In the second paragraph of the complaint it is stated "Defendant [Clearfield Trust Company] is indebted to plaintiff in the amount of Twenty-four Dollars and Twenty Cents ($24.20), with interest thereon at the rate of 6% per annum from the second day of May 1936 upon a contract of guaranty under the following circumstances." Again, in paragraph 10 of the complaint it is alleged that the defendant "became indebted to the plaintiff in the amount here claimed upon defendant's express guaranty of prior endorsements" (R. 3).

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the court below is correct and should be affirmed.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
PAUL A. FREUND,
Special Assistant to the Attorney General.
DAVID L. KREEGER,
PAUL A. SWEENEY,
ARMAND B. DU BOIS,
Attorneys.

FEBRUARY 1943.

APPENDIX

Title 31, Code of Federal Regulations, Sections 202.0, 202.32–202.34 provides:

Section 202.0. Introductory.—The regulations in this part apply to the Treasurer of the United States, Federal Reserve banks and branches; member bank depositaries, special depositaries of public moneys, collectors of internal revenue, collectors of customs, receivers of public moneys, marshals and clerks of courts, all other officers or agents of the United States engaged in collecting, depositing, or transmitting public moneys, and others concerned.

* * * * * * *

202.32. Government checks and warrants; payment by Federal Reserve banks and branches.—Federal Reserve banks and branches will make arrangements to cash Government checks and warrants drawn on the Treasurer of the United States for disbursing officers of the War Department and Navy Department, and other Government officers, provided that satisfactory identification of the officers shall be furnished. The Treasurer will upon special request advise Federal Reserve banks and branches as to whether the balances to the credit of disbursing officers are sufficient for payment of the checks presented. Each Federal Reserve bank and branch will cash Government checks and warrants drawn on the Treasurer of the United States when they are presented

and properly indorsed by responsible incorporated banks and trust companies who guarantee all prior indorsements thereon, including the indorsement of the drawer when the check is drawn in his favor. Checks and warrants cashed by Federal Reserve banks and branches shall be charged to the account of the Treasurer of the United States, subject to examination and payment by the Treasurer. Federal Reserve banks and branches will not be expected to cash Government checks and warrants presented direct to the bank by the general public.

202.33 Government checks and warrants; payment by member bank depositaries.— Each member bank depositary with a fixed balance to the credit of the Treasurer of the United States will cash Government checks and warrants drawn on the Treasurer of the United States when they are presented and properly indorsed by responsible holders who guarantee all prior indorsements thereon, including the indorsement of the drawer when the check is drawn in his favor. Checks and warrants so cashed may be charged to the account of the Treasurer of the United States, subject to examination and payment by the Treasurer. Member bank depositaries are not required, however, to charge Government checks and warrants cashed by them in the account of the Treasurer of the United States, except in special cases where checks drawn on the Treasurer of the United States are deposited for the official credit of the drawer or the credit of other Government officers in the account of the Treasurer of the United States. When Government disbursing officers present official checks to member bank depositaries to be cashed, the Treasurer of the United States upon special

request will advise such depositaries as to whether the balances to the credit of the disbursing officers are sufficient for the payment of the checks presented.

202.34 Government checks and warrants; payment by Treasurer.—The Treasurer of the United States reserves the usual right of the drawee to examine, when received, all Government checks and warrants cashed by Federal Reserve banks and branches and member bank depositaries, and to refuse payment thereon. The Treasurer will handle all such items received by him on the following basis:

(a) Immediate return will be made of any check or warrant, payment of which is refused on account of forged signature of drawer, insufficient funds, stoppage of payment, or any material defect discovered upon first examination, in all of which cases the transit account of the remitting bank will be charged with the amount of the returned check or warrant and the remitting bank will be expected to give immediate credit therefor in the Treasurer's account; but if the original check or warrant is required for use in connection with a criminal investigation or legal proceeding, the original will be retained for that purpose and a photographic copy of the face and back will be forwarded to the remitting bank in lieu of the original.

(b) In the event that any check or warrant which has been paid by the Treasurer is subsequently found to bear a forged indorsement, or to bear any other material alteration or defect which was not discovered upon first examination, a photographic copy of the check or warrant will be forwarded to the remitting bank, and its transit account will be charged with the amount by the Treas-

urer. The remitting bank, if a member bank depositary, will be expected to give immediate credit therefor in the Treasurer's account; if a Federal Reserve bank or branch, it will be expected to demand restitution at once from its prior indorser or indorsers, to maintain a close follow-up on its demand, and to give credit in the Treasurer's account when reimbursement has been made. In the case of checks paid more than a year before reclamation is requested of the presenting bank, the Treasurer may, in his discretion, treat the item as a collection instead of charging the presenting bank's account, with the understanding that no rights of the Government as to ultimate recovery are waived thereby.

(c) In cases of checks or warrants raised or bearing a forged signature of the drawer, not discovered upon first examination by the Treasurer, and in other cases where the Treasurer's right to reclaim is in question, the checks or warrants will be forwarded to the remitting bank as collection items and taken up by the Treasurer when credited, with no intermediate charge in the account of the remitting bank. A photographic copy may be returned in lieu of the original if the latter is required for use in connection with a criminal investigation or legal proceeding.

In any case arising under this section in which a Federal Reserve bank or branch is unable to secure restitution within a reasonable length of time, the facts should be reported to the Treasurer of the United States in order that appropriate action may be taken by him.

After the expiration of 1 year following the close of the fiscal year (ending June 30)

in which they are drawn, checks drawn on the Treasurer of the United States are not payable by him but should be transmitted to the Secretary of the Treasury, Division of Bookkeeping and Warrants, for payment from the "Outstanding Liabilities" appropriation, accompanied by an application for payment over the signature and address of the owner of such checks: Provided, however, That the 1-year restriction does not apply to checks issued on account of public debt obligations and checks issued on account of transactions regarding the administration of banking and currency laws.

U. S. GOVERNMENT PRINTING OFFICE: 1945

P. 2

SUPREME COURT OF THE UNITED STATES.

No. 490.—October Term, 1942.

Clearfield Trust Company, a Corporation, and J. C. Penney Company, a Corporation, Petitioners, *vs.* The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 1, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

On April 28, 1936, a check was drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia to the order of Clair A. Barner in the amount of $24.20. It was dated at Harrisburg, Pennsylvania and was drawn for services rendered by Barner to the Works Progress Administration. The check was placed in the mail addressed to Barner at his address in Mackeyville, Pa. Barner never received the check. Some unknown person obtained it in a mysterious manner and presented it to the J. C. Penney Co. store in Clearfield, Pa., representing that he was the payee and identifying himself to the satisfaction of the employees of J. C. Penney Co. He endorsed the check in the name of Barner and transferred it to J. C. Penney Co. in exchange for cash and merchandise. Barner never authorized the endorsement nor participated in the proceeds of the check. J. C. Penney Co. endorsed the check over to the Clearfield Trust Co. which accepted it as agent for the purpose of collection and endorsed it as follows: "Pay to the order of Federal Reserve Bank of Philadelphia, Prior Endorsements Guaranteed."[1] Clearfield Trust Co. collected the check from the United States through the Federal Reserve Bank of Philadelphia and paid the full amount thereof to J. C. Penney Co. Neither the Clearfield Trust Co. nor J. C. Penney Co. had any knowledge or suspicion of the forgery. Each acted in good faith. On or before May 10, 1936, Barner advised the timekeeper and the foreman of the W. P. A. project on

[1] Guarantee of all prior indorsements on presentment for payment of such a check to Federal Reserve banks or member bank depositories is required by Treasury Regulations. 31 Code of Federal Regulations § 202.32, § 202.33.

which he was employed that he had not received the check in question. This information was duly communicated to other agents of the United States and on November 30, 1936, Barner executed an affidavit alleging that the endorsement of his name on the check was a forgery. No notice was given the Clearfield Trust Co. or J. C. Penney Co. of the forgery until January 12, 1937, at which time the Clearfield Trust Co. was notified. The first notice received by Clearfield Trust Co. that the United States was asking reimbursement was on August 31, 1937.

This suit was instituted in 1939 by the United States against the Clearfield Trust Co., the jurisdiction of the federal District Court being invoked pursuant to the provisions of § 24(1) of the Judicial Code, 28 U. S. C. § 41(1). The cause of action was based on the express guaranty of prior endorsements made by the Clearfield Trust Co. J. C. Penney intervened as a defendant. The case was heard on complaint, answer and stipulation of facts. The District Court held that the rights of the parties were to be determined by the law of Pennsylvania and that since the United States unreasonably delayed in giving notice of the forgery to the Clearfield Trust Co., it was barred from recovery under the rule of *Market Street Title & Trust Co.* v. *Chelten T. Co.*, 293 Pa. 230. It accordingly dismissed the complaint. On appeal the Circuit Court of Appeals reversed, 130 F. 2d 93. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problems raised and the conflict between the decision below and *Security-First Nat. Bank* v. *United States*, 103 F. 2d 188, from the Ninth Circuit.

We agree with the Circuit Court of Appeals that the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935, 49 Stat. 115. The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. Cf. *Board of Commissioners* v. *United States*, 308 U. S. 343; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289. The duties imposed upon the United States and the rights acquired by

it as a result of the issuance find their roots in the same federal sources.[3] Cf. *Deitrick* v. *Greaney*, 309 U. S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447. In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, is not opposed to this result. That case was concerned with a conflict of laws rule as to the title acquired by a transferee in Yugoslavia under a forged endorsement. Since the payee's address was Yugoslavia, the check had "something of the quality of a foreign bill" and the law of Yugoslavia was applied to determine what title the transferee acquired.

In our choice of the applicable federal rule we have occasionally selected state law. See *Royal Indemnity Co.* v. *United States*, *supra*. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of *Swift* v. *Tyson*, 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.

United States v. *National Exchange Bank*, 214 U. S. 302, falls in that category. Its facts are practically on all fours with those of the present case. The Court held that the United States could recover as drawee from one who presented for payment a pension check on which the name of the payee had been forged, in spite of a protracted delay on the part of the United States in giving notice

[3] Various Treasury Regulations govern the payment and endorsement of government checks and warrants and the reimbursement of the Treasurer of the United States by Federal Reserve banks and member bank depositories on payment of checks or warrants bearing a forged endorsement. See 31 Code of Federal Regulations §§ 202.0, 202.32-202.34. Forgery of the check was an offense against the United States. Criminal Code § 148, 18 U. S. C. § 262.

of the forgery. The Court followed *Leather Mfrs. Bank* v. *Merchants Bk.*, 128 U. S. 26, which held that the right of the drawee against one who presented a check with a forged endorsement of the payee's name accrued at the date of payment and was not dependent on notice or demand. The theory of the *National Exchange Bank* case is that he who presents a check for payment warrants that he has title to it and the right to receive payment.[3] If he has acquired the check through a forged endorsement, the warranty is breached at the time the check is cashed. See *Manufacturers Trust Co.* v. *Harriman Nat. Bank Trust Co.*, 146 Misc. 551; *Bergman* v. *Avenue State Bk.*, 284 Ill. App. 516. The theory of the warranty has been challenged. Ames, *The Doctrine of Price* v. *Neal*, 4 Harv. L. Rev., 297, 301-302. It has been urged that "the right to recover is a quasi contractual right, resting upon the doctrine that one who confers a benefit in misreliance upon a right or duty is entitled to restitution." Woodward, Quasi Contracts (1913) § 80; *First Nat. Bank* v. *City Nat. Bank*, 182 Mass. 130, 134. But whatever theory is taken, we adhere to the conclusion of the *National Exchange Bank* case that the drawee's right to recover accrues when the payment is made. There is no other barrier to the maintenance of the cause of action. The theory of the drawee's responsibility where the drawer's signature is forged (*Price* v. *Neale*, 3 Burr. 1354; *United States* v. *Chase Nat. Bank*, 252 U. S. 485) is inapplicable here. The drawee, whether it be the United States or another, is not chargeable with the knowledge of the signature of the payee. *United States* v. *National Exchange Bank*, *supra*, p. 317; *State* v. *Broadway Nat. Bank*, 153 Tenn. 113.

The *National Exchange Bank* case went no further than to hold that prompt notice of the discovery of the forgery was not a condition precedent to suit. It did not reach the question whether lack of prompt notice might be a defense. We think it may. If it is shown that the drawee on learning of the forgery did not give prompt notice of it and that damage resulted, recovery by the drawee is barred. See *Ladd & Tilton Bank* v. *United States*, 30

[3] We need not determine whether the guarantee of prior endorsements adds to the drawee's rights. See Brannan's Negotiable Instruments Law (6th ed.) pp. 330-331, 816-817; First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 134. Cf. Home Ins. Co. v. Mercantile Trust Co., 219 Mo. App. 645. Under the theory of the National Exchange Bank case, the warranty of the title of him who presents the check for payment would be implied in any event. See Philadelphia Nat. Bk. v. Fulton Nat. Bk., 25 F. 2d 995, 997.

F. 2d 334; *United States* v. *National Rockland Bank*, 35 F. Supp. 912; *United States* v. *National City Bank*, 28 F. Supp. 144. The fact that the drawee is the United States and the laches those of its employees are not material. *Cooke* v. *United States*, 91 U. S. 389, 398. The United States as drawee of commercial paper stands in no different light than any other drawee. As stated in *United States* v. *National Exchange Bank*, 270 U. S. 527, 534, "The United State does business on business terms." It is not excepted from the general rules governing the rights and duties of drawees "by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt." *Id.*, p. 535. But the damage occasioned by the delay must be established and not left to conjecture. Cases such as *Market St. Title & Trust Co.* v. *Chelten Trust Co.*, *supra*, place the burden on the drawee of giving prompt notice of the forgery—injury to the defendant being presumed by the mere fact of delay. See *London & River Plate Bk.* v. *Bank of Liverpool*, [1896] 1 Q. B. 7. But we do not think that he who accepts a forged signature of a payee deserves that preferred treatment. It is his neglect or error in accepting the forger's signature which occasions the loss. See *Bank of Commerce* v. *Union Bank*, 3 N. Y. 230, 236. He should be allowed to shift that loss to the drawee only on a clear showing that the drawee's delay in notifying him of the forgery caused him damage. See Woodward, Quasi Contracts (1913) § 25. No such damage has been shown by Clearfield Trust Co. who so far as appears can still recover from J. C. Penney Co. The only showing on the part of the latter is contained in the stipulation to the effect that if a check cashed for a customer is returned unpaid or for reclamation a short time after the date on which it is cashed, the employees can often locate the person who cashed it. It is further stipulated that when J. C. Penney Co. was notified of the forgery in the present case none of its employees was able to remember anything about the transaction or check in question. The inference is that the more prompt the notice the more likely the detection of the forger. But that falls short of a showing that the delay caused a manifest loss. *Third Nat. Bank* v. *Merchants' Nat. Bank*, 76 Hun. 475. It is but another way of saying that mere delay is enough.

Affirmed.

Mr. Justice MURPHY and Mr. Justice RUTLEDGE did not participate in the consideration or decision of this case.